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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

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UNITED FARMERS AGENTS ASSOCIATION, INC., *et al*,

Petitioners,

v.

FARMERS INSURANCE EXCHANGE, *et al.*,

Respondents.

◆

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

◆

PETITION FOR WRIT OF CERTIORARI

◆

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43 pp

QUESTIONS PRESENTED

In a per se antitrust tying case, the lower courts granted the defendants summary judgment based upon a finding that defendants lacked sufficient market power in the relevant market as defined by the Fifth Circuit.

The Fifth Circuit defines relevant market by cross-elasticity of demand and defines market power by life-cycle pricing and switching cost analysis for the primary market only.

Does this Court's decision in *Eastman Kodak v. Image Technical Services Inc.*, 112 S.Ct. 2072 (1992) operate to remove a blind reliance upon antitrust economic theory such as that relied upon by the Fifth Circuit and does *Kodak* therefore redefine relevant markets and market power so as to allow plaintiffs to avoid summary judgment if they show genuine issues of material fact exist that there is a contractual tie affecting a not insubstantial amount of interstate commerce and defendants are shown to have market power or monopoly power in a non-primary relevant market?

Further presented for clarification is the question: can a lack of power in a primary market preclude review of evidence and, ultimately, preclude a determination of market power in derivative markets?

LIST OF ALL PARTIES

Petitioners:

UNITED FARMERS AGENTS ASSOCIATION, INC.;
THOMAS J. VINSON, on behalf of himself and all persons similarly situated;
ROBERT D. MOON, on behalf of himself and all persons similarly situated

Respondents:

FARMERS INSURANCE EXCHANGE, a California reciprocal or inter-insurance exchange;
FIRE INSURANCE EXCHANGE, a California reciprocal or inter-insurance exchange;
TRUCK INSURANCE EXCHANGE, a California reciprocal or inter-insurance exchange;
MID-CENTURY INSURANCE COMPANY; and
FARMERS NEW WORLD LIFE INSURANCE COMPANY

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF ALL PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 14

APPENDIX

Appendix A (Fifth Circuit Opinion) A-1

Appendix B (Rehearing Denied) A-12

Appendix C (Petition for Rehearing) A-13

TABLE OF AUTHORITIES

Page

Cases

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) 8

Eastman Kodak v. Image Technical Services, Inc., 504 U.S. 451, 112 S.Ct. 2072 (1992) 2, 4-13

Parratt v. Taylor, 451 U.S. 527, 532-34 (1981) 8

U.S. v. Loew's, 371 U.S. 38, 45 (1962) 7

United States v. Doe, 465 U.S. 605, 610 (1984) 8

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) 8

Eastman Kodak v. Image Technical Services, Inc., 504 U.S. 451, 112 S.Ct. 2072 (1992) 2, 4-13

Parratt v. Taylor, 451 U.S. 527, 532-34 (1981) 8

U.S. v. Loew's, 371 U.S. 38, 45 (1962) 7

United States v. Doe, 465 U.S. 605, 610 (1984) 8

Other Legal Publications

Carl Shapiro, *Aftermarkets and Consumer Welfare: Making Sense of* Kodak (Symposium on Post-Chicago Economics), 63 Antitrust L.J. 483 (1995). . . . . Fn. 3, p. 6

David F. Shores, *Law, Facts and Market Realities in Antitrust Cases After Brook and Kodak,* 48 SMU L. REV. 1835 (1995). . . . . Fn. 2, p. 5

Ronald S. Katz, *If Kodak is Just a 'Summary Judgment Case,' Then Why Are We Still Discussing It Two-and-One-Half Years Later?* (Anti/Intellectual Property Claims in High Technology Markets, Cosponsored by California Continuing Education of the Bar C137 ALI-ABA 61 (Jan. 26, 1995) . . . . . Fn. 2, p. 5

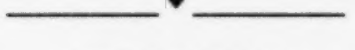
Ronald S. Katz, *If Kodak is Just a 'Summary Judgment Case,' Why Are We Still Discussing It Three Years Later?,* 12 No. 10 COMPUTER L. 11 (Oct. 1995) . . . . . Fn. 2, p. 5

PETITION FOR WRIT OF CERTIORARI

United Farmers Agents Association, Inc., Thomas J. Vinson, and Robert D. Moon ("UFAA, *et al*") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 25, 1996, in order to resolve the conflict between the Fifth Circuit and the Supreme Court of the United States on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is published as *United Farmers Agents Association, Inc. v. Farmers Insurance Exchange*, 89 F.3d 233 (5th Cir. 1996). It is reprinted in a separate appendix, Appendix A ("App.A") at page A-1. By order issued September 26, 1996 (App. B at A-12), the Fifth Circuit denied the Appellants' Petition for Rehearing (App. C at A-13). The preceding decision of the United States District Court for the Western District of Texas is published at 892 F.Supp. 890.



JURISDICTION

On July 25, 1996, the United States Court of Appeals for the Fifth Circuit affirmed the United States District Court for the Western District of Texas's dismissal by Summary Judgment. On September 5, 1996, Appellants' Petition for Rehearing was denied *per curiam* by the Fifth Circuit. Pursuant to Court Rule 13.3, this petition has been filed within 90 days of

the denial of rehearing.

The rationale for the Fifth Circuit's decision is in direct and apparent conflict with this Court's decision in *Eastman Kodak v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S.Ct. 2072 (1992), and review should be considered in accordance with Court Rule 10(c).

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The Sherman Anti-Trust Act, §1, as amended, 15 U.S.C. §1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

The Clayton Act, §3, 15 U.S.C. § 14, provides in relevant part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce . . . to make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . , or fix a price charged therefor...on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or

seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

STATEMENT OF THE CASE

United Farmers Agents Association (UFAA)[1] and Farmers insurance agents Thomas J. Vinson and Robert D. Moon, sued several entities of Farmers Insurance Group in a class action on behalf of all Farmers agents and alleged that Farmers engaged in an illegal tying arrangement where the tying product was on-line electronic access to the Farmers Agency Network System and the tied products were: 1) computers sold by Farmers to its agents, 2) peripherals sold by Farmers to its agents, and 3) service/maintenance agreements sold to the agents by Farmers and/or IBM. Plaintiffs further contended that the tying arrangement was a per se illegal contractual tie within the relevant market for electronic access by agents to Farmers' network. Prior to the completion of discovery, the district court certified the class for liability purposes under FED.R.CIV.P. 23(b)(1) but deferred a ruling on certification of a damages class pending the outcome on liability.

The district court granted Farmers Insurance summary judgment and dismissed the antitrust class action of the plaintiffs by adopting a magistrate's report. Plaintiffs appealed on grounds of procedural irregularity, abuse of discretion, and failure to use the proper standard of review for summary

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[1] A voluntary non-profit nationwide association counting among its membership over 2,500 current and former Farmers agents.

judgment cases involving illegal tying arrangements as set forth by this Court in *Eastman Kodak v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992). On appeal, the Fifth Circuit affirmed by defining the relevant market as the worldwide market for insurance sales, finding that Farmers lacked market power in the relevant market, and declining to make further inquiry into whether Farmers' policies constituted an illegal tie.

The Fifth Circuit defined the relevant market by cross-elasticity of demand between a given product and its substitutes. To determine cross-elasticity of demand, the Fifth Circuit sought to gauge the information and switching costs incurred by agents theoretically choosing to switch from selling Farmers insurance to selling the policies of another competing company. The Fifth Circuit sought to distinguish this case from *Kodak* by repeating the magistrate's assertion that plaintiffs failed to proffer evidence of above-market pricing or price discrimination. Appellants filed a Petition for Rehearing (App. C at A-13) to alert the court of 1) the voluminous summary judgment proof of above-market pricing and price discrimination as defined in *Kodak*; and 2) the fallacy of defining the relevant market as worldwide insurance sales while maintaining that Farmers agents are the only consumers for the purpose of determining information and switching costs. That Petition was denied. (A-12).

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Opinion Directly Conflicts With This Court's Ruling in *Kodak* and Is Contrary to the Policies Set Forth Therein Regarding Criteria for Summary Judgment in Antitrust Tying Cases.

For many observers and legal scholars, this Court's

decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S.Ct. 2072 (1992) stands for a departure from the fifteen-year reign of the highly theoretical Chicago School of Economics over antitrust law in this country.[2] The "Chicago School" is a theoretical construct that, *inter alia,* does not recognize the existence of a company's anticompetitive power in secondary or derivative markets (aftermarkets, for example) unless that company also controls its primary product market. Another major tenet of Chicago School theory is that consumers have sufficient knowledge to make every important economic decision and are sophisticated enough to determine the life-cycle impact of deliberate attempts by companies to engage in installed-base opportunism or take advantage of actual or perceived monopolies.

This Court held in *Kodak* that, thenceforth, antitrust law would look to the facts on a case-by-case basis to determine the ultimate antitrust issues, eschewing presumption and reliance upon unsupported economic theories such as those propounded by the Chicago school. "Legal presumptions that rest on formalistic distinctions rather than market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis focusing on the particular facts disclosed by the record." *Id.* at 2082. This Court realized that market imperfections inevitably would lead to theoretical inconsistencies and attempted to allow the analysis of market imperfections such as high information and

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[2] Ronald S. Katz, *If Kodak is Just a 'Summary Judgment Case,' Why Are We Still Discussing It Three Years Later?*, 12 No. 10 COMPUTER L. 11 (Oct. 1995). Ronald S. Katz, *If Kodak is Just a 'Summary Judgment Case,' Then Why Are We Still Discussing It Two-and-One-Half Years Later?* (Anti/Intellectual Property Claims in High Technology Markets, Cosponsored by California Continuing Education of the Bar C137 ALI-ABA 61 (Jan. 26, 1995). David F. Shores, *Law, Facts and Market Realities in Antitrust Cases After Brook and Kodak*, 48 SMU L. REV. 1835 (1995).

switching costs into antitrust analysis without a wholesale rejection of economic theory. For example, the existence of significant information and switching costs, the Court observed, could create a less responsive connection between the demand for equipment and the price of parts than economic theory would suggest. *Id.* at 2085-6. As a result of this reliance upon a case-by-case factual analysis, *Kodak* has been put forward as the preeminent example of so-called "Post-Chicago Economics."[3]

The basic premise in antitrust tying law is that consumers are harmed by being forced to take a product they do not want, or one they would prefer to buy elsewhere. As a result, competing producers of tied products are harmed in that their products are rejected in favor of inferior products forced upon the consumer through the tie. The foregoing harm can occur only if the company attempting to require such a tie has sufficient market power to force a purchaser to do something she would not do in a competitive market. Regardless of whether economic theory exists to the contrary, the relevant statutes in this area clearly were written with an understanding that such arrangements were anticompetitive and those statutes were intended to make such tying arrangements illegal.

This Court rejected Kodak's argument that the relevant market analysis was dependent upon cross-elasticity of demand. While this Court recognized that this concept had generally been used by the courts to define the relevant product market, its analysis of the theory in respect to the facts in *Kodak* resulted in the conclusion that, "contrary to Kodak's assertion, there is no immutable physical law—no 'basic economic reality'—insisting that competition in the equipment market cannot

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[3] Carl Shapiro, *Aftermarkets and Consumer Welfare: Making Sense of* Kodak (Symposium on Post-Chicago Economics), 63 Antitrust L.J. 483 (1995).

coexist with market power in the aftermarkets." *Kodak*, at 2084. This is important because Kodak, like Farmers in the present case, sought summary judgment on the grounds that, without market power in their primary market, there could be no market power in the derivative market and, therefore, no illegal tie. Put another way, what the quoted section of *Kodak* means is that market power in primary markets is NOT a prerequisite to a determination of market power in derivative markets. Therefore, this Court decided that, even though Kodak lacked market power in the market for copiers (Kodak's primary market), summary judgment could not be granted on that ground alone since that lack of power in the primary market need not preclude, as a matter of law, the existence of market power in derivative markets. That issue being decided, the relevant market was defined in accordance with the effect of an alleged tying arrangement upon consumers and/or competitors. This Court defined it as the market for Kodak copiers and decided that whether Kodak had monopolistic market power within that relevant market was a triable claim.

The acceptance of a tie by consumers could thus be evidence of a seller's market power in and of itself according to *Kodak*'s reasoning, so long as consumers were buying tied products they would have preferred to purchase elsewhere. This was a return to antitrust inquiry in which presumptions based upon economic theory take a back seat to market reality; where " . . . it is fair to presume that the inability to buy the product elsewhere gives the seller market power." *U.S. v. Loew's,* 371 U.S. 38, 45 (1962).

Petitioners proffered evidence that Farmers' conduct increased prices and excluded a substantial competition in the tied market for computers, peripherals, and service/maintenance for agents seeking to achieve on-line access to Farmers' network. Those agents were defined by Petitioners as the

consumers in the relevant market.[4] Petitioners defined the relevant market to be the market for on-line information to Farmers' computer network, containing necessary policy, marketing, and rating information useful only to Farmers agents. Petitioners' evidence showed that lower price and equivalent or higher quality would be available in the tied product marketplaces but for Farmers' tying arrangement. Respondents failed to show any competitively relevant justifications and, according to *Kodak*, "when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment." *Kodak*, at 2088.

Petitioners have relied upon the above interpretation of the *Kodak* decision since the inception of this case, as have countless other plaintiffs seeking antitrust relief across the nation. To date, this Court has not granted any petitions for writ for the purpose of either enforcing or clarifying the *Kodak* decision with regards to summary judgment in antitrust tying cases. Certiorari is appropriate here either because of direct and apparent conflict—*United States v. Doe*, 465 U.S. 605, 610 (1984) ("to resolve the apparent conflict between the Court of Appeals holding and the reasoning underlying this Court's holding in [another case]")—or because it has been the subject of continuing controversy and confusion both in scholarly journals and the federal courts. *Cf. Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *Parratt v. Taylor*, 451 U.S. 527, 532-34 (1981).

In making its decision to affirm summary judgment, the Fifth Circuit chose to ignore the facts evidencing an illegal

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[4] The Fifth Circuit's choice of the buyers of insurance as consumer in the relevant market is questionable in light of the fact that Farmers only provided computers and computer access to agents, and never provided them to buyers of insurance.

tying scheme by Farmers—supplanting factual analysis with economic theory—and, in doing so ignored *Kodak*'s precedent as well as Appellants' voluminous evidence. It relied heavily upon the theories of Areeda and Turner in forcing cross-elasticity of demand into a scenario which clearly would not support such a theoretical construct. (A-4, fn. 3). The Fifth Circuit used sweeping generalizations, tending to conceal truth rather than reveal it. As a result, the Fifth Circuit refused to make inquiry into whether Farmers' policies constitute an illegal tie denied plaintiffs their rightful day in court. (A-3).

The Fifth Circuit's seminal error was in defining the relevant market as the worldwide insurance sales market (Farmers' primary market) without regard to the evidence presented by Petitioners of real-world market reality. That reality is as follows: Agents seeking to obtain on-line access to Farmers' computer network were contractually refused the opportunity to purchase that access without first purchasing a computer or computers from Farmers and promising to likewise purchase peripherals and service/maintenance from Farmers. This tying arrangement forced thousands of agents to pay an average of $7,500 more per computer than they would have paid for equivalent or superior equipment in the competitive marketplace.[5]

When responding to, and disagreeing with, Kodak's assertion that a single brand of a product or service can never be a relevant market under the Sherman Act, this Court stated,

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[5] No inferences were drawn in Petitioners' favor despite this Court's insistence that their evidence is to be believed and "all justifiable inferences are to be drawn in their favor." *Kodak*, at 2076.

> "The relevant market for antitrust purposes is determined by the choices available to Kodak equipment owners. * * * Because service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective is composed of only those companies that service Kodak machines."

Kodak, at 2090. Compared to the Fifth Circuit's decision, *Kodak* presents the better-reasoned approach. Using *Kodak*'s guideline, because the on-line access to information sought by agents is obtainable only through Farmers and that information is not interchangeable with other insurance carriers' information, the relevant market in this case is the market for access to Farmers' network just as the relevant market in *Kodak* was the Kodak copier market. (See Appellants' Petition for Rehearing at A-17-20 for a discussion of the logical inconsistencies of the Fifth Circuit's choice of worldwide insurance sales as the relevant market.)

Instead of correctly defining the relevant market based upon market reality, the Fifth Circuit chose to bend reality to force it into preconceived theoretical parameters. One example of this is the Fifth Circuit's analysis of information and switching costs. Rather than analyze these costs in relation to agents' decisions whether or not to obtain on-line access on Farmers' onerous terms, the Fifth Circuit chose to analyze them in relation to the agents' decisions to become Farmers agents *ab initio* or to switch to other insurance companies upon the initiation or notification of the tie. (Whether such lifecycle pricing actually occurs obviously raises a factual issue since the record contains no evidence that the required information was

available to the rank-and-file agents.)[6] Regardless of the inaccuracy of the Fifth Circuit's presumption that switching costs were negligible, its analysis was based upon a broader market than that required by *Kodak*. By defining the relevant market as broadly as it did, the Fifth Circuit rejected Petitioners' reliance upon *Kodak* and went so far as to dismiss Appellants' *Kodak*-based arguments as a failure to raise a question of material fact as to the relevant market.

The Fifth Circuit, in part, dismissed Petitioners' case because it decided that Farmers lacked the market power required to find an illegal tie. In *Kodak,* this Court defined that requirement to be "appreciable economic power in the tying product market" affecting "a substantial volume of commerce in the tied market." *Id.* at 2079. It cannot be denied that Farmers has total control over access to the information contained in its mainframe computer. Nor can it be denied that

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[6] If, on the one hand, such lifecycle pricing does not occur and agents are largely in the dark concerning the cost of switching to work for another insurance company or, on the other hand, if such lifecycle pricing does occur and agents realize that their switching cost is prohibitively high, the Fifth Circuit's theory fails because its presumptive contention that switching costs were inconsequential would not reflect market reality just as Kodak's theory failed for the same reason. Just like in *Kodak*, this particular market fails to perform according to economic theory, not because the theory is unsound, but because at least one premise (readily available information), upon which the theory is constructed, does not exist. Appellants made it clear in their Brief that 1) such information was intentionally and admittedly withheld by Farmers from its agents prior to the present lawsuit; 2) information as to Farmers' policies were obtained only through discovery in this case; and 3) that discovered information was further withheld from the agents by the operation of a protective order.

Nonetheless and furthermore, the Fifth Circuit acknowledged that more successful agents and agents who signed on with Farmers before the tying arrangement was initiated had higher switching costs than newer less successful agents. However, the Fifth Circuit refused to allow even those tied-in agents a chance to continue to trial.

Farmers has total control over the market for that access by agents. As to tying product volume, evidence was presented that the tying arrangement reduced sales by tens of millions of dollars in the interstate market for new and used computers capable of achieving access.[7] These facts were sufficient to survive summary judgment on market effect alone, without additional evidence presented of the monetary impact upon the peripheral and service/maintenance markets. Further proof of market power was evidence that agents would have obtained computers elsewhere, given that opportunity. This fits with this Court's definition of market power as the power "to force a purchaser to do something that he would not do in a competitive market." *Id.* at 2080. Clearly the Fifth Circuit erred in failing to apply this Court's directions in determining market power.

The Plaintiffs in *Kodak* presented sufficient proof that a reasonable trier of fact could find, first, that service and parts were two distinct products in light of evidence indicating that each had been sold separately, and second, that Kodak had tied the sale of the two products in light of evidence indicating that it would sell parts to third parties only if they agreed not to buy service from ISOs. *Id.* at 2079-80. This Court deemed that sufficient evidence of a tying arrangement to defeat a summary judgment motion. Despite Petitioners' proof and the Fifth Circuit's apparent acceptance that access and computers, peripherals, and service/maintenance are all separate products[8], despite proof of the existence of contractual ties where the agency network system contract required purchase or lease

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[7] These amounts are well in excess of the damages ultimately awarded by the jury in the *Kodak* case.

[8] Which were available separately subsequent to the inception of this lawsuit.

of computers from Farmers, and despite proof of the existence of computer purchase agreements which further required purchase of peripherals and service/maintenance from Farmers, the Fifth Circuit granted summary judgment for Farmers on the ground that no evidence existed of a tie in violation of antitrust laws.[9] This is an unacceptable refusal to accept the decision in *Kodak* as precedent.

The repercussions of the Fifth Court's decision upon antitrust tying cases is potentially enormous because it puts the meaning and, ultimately, a basic conclusion of this Court's decision in *Kodak* at doubt. It leaves unanswered for all antitrust plaintiffs the issue of whether a lack of power in a primary market can serve to prohibit review of evidence and, ultimately, allow defendants to avoid a determination of market power in derivative markets.

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[9] The Fifth Circuit even determined that Farmers never sold computers despite Farmers' admissions and contractual evidence to the contrary. (A-4). Other factual discrepancies abound. *See,* Appellants' Petition for Rehearing A-19-23.

CONCLUSION

For the foregoing reasons, it is apparent that the Fifth Circuit's decision in this case has been decided "in a way in conflict with applicable decisions of this Court" and, thus, the petition for writ of certiorari should be granted.

Respectfully submitted,

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DATED: December 4, 1996

APPENDIX A

89 F.3d 233
65 USLW 2101, 1996-2 Trade Cases P 71,500
(Cite as: 89 F.3d 233)

UNITED FARMERS AGENTS ASSOCIATION, INC.; Thomas J. Vinson; Robert D. Moon,

Plaintiffs-Appellants,

v.

FARMERS INSURANCE EXCHANGE, a California Reciprocal or Inter-Insurance Exchange; Fire Insurance Exchange, a California Reciprocal or Inter-Insurance Exchange; Truck Insurance Exchange, a California Reciprocal or Inter-Insurance Exchange; Mid-Century Insurance Company; Farmers New World Life Insurance Company,

Defendants-Appellees.

No. 95-50559.

United States Court of Appeals,
Fifth Circuit.

July 25, 1996.

*234 Bogdan Rentea, Oren Lee Connaway, Rentea & Associates, Austin, TX, for plaintiffs-appellants.

James W. Cannon, Jr., Akin, Gump, Strauss, Hauer & Feld, Austin, TX, James E. *235 Coleman, Jr., Michael Thomas Braden, Lyndon F. Bittle, Carrington, Coleman, Sloman & Blumenthal, Dallas, TX, Nannette K. Beaird, Akin, Gump, Strauss, Hauer and Feld, Houston, TX, Don T. Hibner, Jr., Michelle Sherman, Sheppard, Mullin, Richter & Hampton, Los Angeles, CA, for defendants-appellees.

Appeal from the United States District Court for the Western District of Texas.

Before GARWOOD, DAVIS and DeMOSS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge.

The United Farmers Agents Association (UFAA) and Farmers

insurance agents Thomas J. Vinson and Robert D. Moon appeal the district court's order granting Farmers Insurance summary judgment and dismissing their antitrust class action. We AFFIRM.

I.

Farmers Insurance is a group of five insurance companies with approximately 14,000 independent contractor agents in 29 states. Under the contract between Farmers and its agents, Farmers is obligated to provide policyholder information to the agents. It has always provided this information through manual records in paper and book form. In 1981, Farmers set up a computer system, the Farmers Agency Network System (FANS), to allow agents on-line access to this information in addition to the traditional manual access. Agents who wished to gain electronic access to policyholder information through FANS were required to purchase a specially configured IBM computer from Farmers or to use another agent's IBM computer purchased from Farmers.

The written agreement between Farmers and agents who purchased computers and gained access to FANS specifically stated that, absent written agreement from Farmers, only computers purchased through Farmers would be allowed to access FANS. Farmers' policy was to never grant a written waiver of this provision. This policy continued until 1993 when Farmers began allowing agents to use personal computers and computers purchased from third-party vendors to access FANS.

UFAA, Vinson and Moon (plaintiffs) filed this action as an antitrust class action on behalf of all Farmers agents alleging that Farmers illegally tied electronic access to policy information to the purchase of computers from Farmers. The district court certified the class for liability purposes under Federal Rule of Civil Procedure 23(b)(1) but deferred a ruling on certification of a damages class pending the outcome on liability. The district court referred discovery motions and other dispositive and non-dispositive motions to a magistrate judge who recommended that the district court grant summary judgment in favor of Farmers. On April 19, 1995, the district court adopted the magistrate's Report and Recommendation in full and dismissed the plaintiffs' suit. On appeal, plaintiffs argue that

the district court erred by granting Farmers' motion for summary judgment. [FN1]

FN1. Plaintiffs also assert that the district court erred by failing to review the summary judgment record de novo before adopting the magistrate judge's recommendation, using an improper standard in deciding whether summary judgment was appropriate and failing to certify plaintiffs as a damages class under Federal Rule of Civil Procedure 23(b)(3). Our de novo review of the record and use of the proper standard for granting summary judgment cure the first two of these asserted errors. Our affirmance of the district court's decision to grant summary judgment makes it unnecessary for us to consider the third.

II.

A.

Plaintiffs argue that Farmers' policies regarding electronic access to FANS constitute a per se illegal tying arrangement [FN2] and allege that the relevant *236 market [FN3] in which Farmers is illegally exercising market power is the market for electronic access to Farmers policy information. Farmers responds by arguing that the relevant market should be insurance sales and, even if the court accepts the plaintiffs' argument that a separate market exists for electronic access to Farmers policy information, Farmers has no power in the market for electronic access to Farmers policy information because of intense competition in the insurance sales market. We find that Farmers has no market power in the relevant market (insurance sales) and no market power even in the plaintiffs' alleged relevant market (electronic access to policy information). Market power is a necessary prerequisite to an illegal tie so we need not make any further inquiry into whether Farmers' policies constitute an illegal tie.

FN2. Tying exists when "a seller refuses to sell one product, which a buyer desires, unless the buyer also agrees to purchase a second product, which is not otherwise desired from this seller on the offered terms.... The desired product is called the 'tying' product; the other is the 'tied' product." 9 Phillip E. Areeda, *Antitrust Law* ¶ 1700a (1991). See also *Eastman Kodak Co. v. Image Technical*

Services, 504 U.S. 451, 461-62, 112 S.Ct. 2072, 2079-80, 119 L.Ed.2d 265 (1992). A tying arrangement is per se illegal when it has the following characteristics: (1) Two separate products (as opposed to components of a single product); (2) The two products are tied together or customers are coerced; (3) The supplier possesses substantial economic power over the tying product; (4) The tie has an anticompetitive effect on the tied market; and (5) The tie affects a not insubstantial volume of commerce. 9 Areeda, *Antitrust Law* ¶ 1702. See also *Kodak*, 504 U.S. at 461-62, 112 S.Ct. at 2079-80; *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 11-28, 104 S.Ct. 1551, 1558-66, 80 L.Ed.2d 2 (1984). Tying arrangements and other restraints of trade that do not fit the criteria for per se illegality are evaluated under the Rule of Reason. *Jefferson Parish Hosp. Dist.*, 466 U.S. at 29, 104 S.Ct. at 1567. Under the Rule of Reason, the plaintiff has the burden of proving that the tying arrangement "unreasonably restrained competition." *Id.* This burden requires an inquiry into the actual effect of the tying arrangement on competition in the tied market. *Id.*

FN3. The relevant market in an antitrust inquiry is defined by the cross- elasticity of demand between a given product and its substitutes. 2 Phillip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 519a (1991). The cross-elasticity of demand for substitutes measures consumers' propensity to switch from one product to another, similar product when relative prices change. See William J. Baumol & Alan S. Blinder, *Economics: Principles and Policy* at 343 (1979). Products similar enough that a small relative price change causes consumers to substitute one for another are in the same market. 2 Areeda & Turner, *Antitrust Law* ¶ 525a.

Under the undisputed facts of this case, we agree with Farmers that the relevant market is the market for insurance sales. The only product that Farmers markets to consumers is insurance. We agree with the magistrate that the summary judgment record is "replete with evidence that Farmers Insurance sells insurance, not electronic access, not computers." (emphasis in original). Plaintiffs' alleged market consists of a single brand (Farmers) and a tying product (electronic access to policy information) that has never been available to anyone other than Farmers agents. The information that

the alleged tying product allows agents to access has always been available to agents in book form for free. Additionally, plaintiffs' own attorney could offer no justification at oral argument for choosing electronic access to Farmers policy information as the relevant market other than that he was trying to define the market as narrowly as possible (in order to make it look as if Farmers had market power). Plaintiffs have not alleged that Farmers has a superior or unique insurance product that allows it to charge consumers more for policies or pay agents less for selling them, and they have shown no evidence that new Farmers agents would face significant information or switching costs [FN4] in deciding whether to sell Farmers insurance or the insurance of another company. The agents have failed to give us any reason to view the market for electronic access to Farmers policy information as the relevant market.

FN4. Information costs in this case are the costs incurred by new agents in finding out how much Farmers will charge for electronic access to policy information and other services after they begin selling Farmers policies. Switching costs are the costs incurred in switching from selling Farmers insurance to selling the policies of another company. Compare *Kodak*, 504 U.S. at 473-77, 112 S.Ct. at 2083-88.

This suit is essentially an intracompany dispute over how to run a computer system, not a valid claim under antitrust laws. Economic power derived from contractual agreements such as franchises or in this case, the agents' contract with Farmers, "has nothing *237 to do with market power, ultimate consumers' welfare, or antitrust." Benjamin Klein & Lester F. Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.LAW & ECON. 345, 356 (1985). We agree with the magistrate judge and the district court that plaintiffs fail to raise a question of material fact as to whether electronic access to Farmers policy information is the relevant market for our inquiry.

The relevant market for an inquiry into market power in this case is the market for insurance sales, and the agents do not contend that Farmers could exercise (or has exercised) market power in that market. The agents' claim is not, therefore, cognizable under

antitrust laws, and the magistrate judge and the district court correctly determined that Farmers was entitled to summary judgment.

B.

Even if we accept the plaintiffs' alleged market for electronic access to policy information as the relevant market, the plaintiffs have failed to prove that Farmers had or exercised market power. Farmers has 100% of the market share in the tying product (electronic access to policy information). However, this does not mean that Farmers has market power in the tying market. In fact, undisputed evidence showing that the markets for insurance sales and agents are highly competitive makes plaintiffs' argument that Farmers has market power in the market for its policy holder information highly unlikely in the absence of prohibitive information costs or the ability to price discriminate [FN5] between agents with high switching costs and those with low or no switching costs. See *Kodak*, 504 U.S. at 475, 112 S.Ct. at 2086-87. Plaintiffs have cited no evidence that information or switching costs were high for most agents and offer no evidence that Farmers attempted to engage in price discrimination.

FN5. Price discrimination is charging different buyers different prices for the same item. A price-discriminating monopolist charges each consumer as much as the consumer is willing to pay for an item. Consumers who desperately need a particular product are charged a high price for it while those who do not really need the product and will refuse to buy it rather than pay a high price are charged a relatively low price. A price- discriminating monopolist makes as much money as possible on its product because it charges high prices to the people who are willing to pay high prices without losing sales to people willing to pay only a low price. See 2 Areeda & Turner, *Antitrust Law* ¶ 514a.

The plaintiffs argue that *Kodak* compels us to deny Farmers' motion for summary judgment. However, their reliance on *Kodak* is misplaced. The Supreme Court's decision in *Kodak* was a rejection of Kodak's assertion that market power could never exist over repair parts in any case where the defendant did not have market power over the earlier-purchased machines needing those parts. Critically, the plaintiffs in *Kodak* produced evidence that Kodak was charging above

market prices for its service and was engaging in price discrimination in favor of the knowledgeable customers who could most easily obtain information or switch companies. *Kodak*, 504 U.S. at 465, 476, 112 S.Ct. at 2081, 2087. By contrast, the plaintiffs in this case have failed to proffer any specific evidence that the computers sold by Farmers were sold at above-market prices or that other equipment of comparable quality was available for less. The only summary judgment evidence plaintiffs submitted was general testimony that third-party vendors of used IBM system 36 computers were selling them for less than Farmers and in larger quantities. They offer no evidence regarding price, quality, reliability or the expense necessary to configure these computers to FANS. Except for general disclaimers, plaintiffs offered no assurance that these used computers would maintain the security of Farmers' policy information and would not introduce viruses into the system. Additionally, plaintiffs offer no evidence of an appropriate market price for electronic access to policy information and have failed to even allege that the tied bundle of electronic access and computers cost more than the sum of their market prices. See *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 (7th Cir.1985) ("[U]nless the plaintiff shows that the package price was elevated the suit *238 must be dismissed without further ado"), cert. denied, 475 U.S. 1129, 106 S.Ct. 1659, 90 L.Ed.2d 201 (1986); *Kypta v. McDonald's Corp.*, 671 F.2d 1282 (11th Cir.) (same), cert. denied, 459 U.S. 857, 103 S.Ct. 127, 74 L.Ed.2d 109 (1982). In sharp contrast to *Kodak*, in which the plaintiffs supported their claims of market power with evidence that Kodak charged above-market prices and engaged in price discrimination, the plaintiffs here simply allege that Farmers charged prices above the market price for computers without offering any evidence of what the market price for reliable computers was or alleging that the bundle of products, taken together, was sold at an above-market price.

The plaintiffs have failed to raise a question of material fact as to whether Farmers has sufficient market power in the market for electronic access to Farmers policy information to force agents to buy computers at higher than market prices. The fact that Farmers required agents to purchase a computer from it in order to obtain electronic access to policy information does not prove that Farmers

had market power. See *Breaux Bros. Farms, Inc. v. Teche Sugar* Co., 21 F.3d 83, 86-87 (5th Cir.), cert. denied, — U.S. —, 115 S.Ct. 425, 130 L.Ed.2d 339 (1994). As noted above, the summary judgment record contains no evidence that the computers were sold at a premium price or that acceptable alternatives were available for less. It also contains no evidence of what electronic access to policy information should cost. In fact, the summary judgment record strongly supports Farmers' argument that it had no power in the electronic-access-to-policy-information market.

Plaintiffs do not dispute that the insurance sales market is highly competitive. Absent high information or switching costs, intense competition in the market for insurance agents will force Farmers to pay competitive wages and preclude it from imposing above-market prices on its agents for the services it provides them. Additionally, availability of manual access to policy information was a good substitute for electronic access. This seriously limited Farmers' ability to charge more than the market price for electronic access to the same information. [FN6] The summary judgment record here contains no evidence that information or switching costs were high enough to produce any substantial market power for Farmers and no evidence that manual access to policy information was so seriously inadequate as a substitute for electronic access as to allow Farmers to exercise market power over electronic access.

FN6. Substitutes limit market power by giving consumers an alternative to paying an above-market price for a product. The existence of a good substitute at a competitive price (in this case manual access to policy information for free) prevents a producer from selling its product at an above-market price. An attempt to raise price of the product above a competitive level will be met with a shift in demand from the product to its substitute. See 2 Areeda & Turner, *Antitrust Law* ¶ 525a.

Information and switching costs for Farmers agents hired after 1981 when FANS was implemented were virtually nonexistent. The summary judgment record shows that Farmers openly required agents wishing to access FANS to do so only with computers purchased from Farmers. Any agent hired would have known of the two ways

to obtain policy information and could have easily inquired about the cost of electronic access. The computer installment contract clearly states that no non-Farmers computer will be allowed to access FANS without the written consent of Farmers. Division manager Bob Akers testified that he regularly told his agents that Farmers' policy was to not allow any computers purchased from third-party vendors to access FANS. Internal correspondence shows that a corporate officer who led an agent to believe that he could hook up his computer to FANS even though it was purchased from a third party was quickly reprimanded and informed that Farmers' policy was to not allow FANS access to any computers purchased from third parties. The plaintiffs produce no evidence that suggests that this information was difficult to obtain. Agents would clearly have become aware of Farmers' policy long before they faced significant switching costs.

If an agent, unhappy with Farmers' computer policy, wished to move to a new company, *239 he was free to do so. Switching costs for most agents were very low. The only switching cost evident in the summary judgment record is the inability to continue earning commission from Farmers policies which agents have already sold. New agents have virtually no switching costs because they have sold no policies or only a few. These agents can switch to selling insurance for another insurance company without incurring any significant cost. The only group of agents that faced switching costs of any significance were Farmers agents hired before 1981 when FANS was implemented. Switching costs for these agents could have been high because the agents could not take their customers with them if they left. Policyholders are Farmers' customers under the terms of the agency agreement and departing agents would be forced to give up the income from the numerous policies they had sold in previous years. [FN7]

FN7. It is important to note that even agents who faced high switching costs in the decision to switch insurance companies could easily have continued selling policies with the manual system. Farmers clearly did not require agents to use FANS and continued to supply its agents with manual policy information for free. Even, if manual access to policy information was inferior to electronic access, it was a reasonably good substitute that would have seriously limited Farmers' ability to charge above-market prices for electronic access

and computers even to those agents with many policies in force.

The absence of significant information costs to the agents and the existence of switching costs for some agents but not for others means that in order for Farmers to have exercised market power in the markets for electronic access and computers, it must have engaged in price discrimination. Farmers could exercise market power and sell electronic access or computers at above- market prices only to those agents with high switching costs. Agents with low switching costs would refuse to pay an above-market price for the bundled electronic access and computers. Rather than pay a premium, these agents could simply leave Farmers and move to another insurance company.

Plaintiffs submit no evidence that Farmers charged agents with many policies in force more than it charged new agents or those with few policies in force. They do not even allege that Farmers attempted to engage in price discrimination. Without an allegation that price discrimination occurred or evidence that Farmers agents faced prohibitive costs in discovering Farmers' computer policy, the plaintiffs cannot seriously argue that Farmers had or exploited any market power. Plaintiffs fail to raise a question of material fact as to whether Farmers had market power in the market for electronic access to policy information.

Conclusion

We agree with the district court and the magistrate judge that electronic access to policy information is merely a component of Farmers' insurance product and that the relevant market for an antitrust inquiry is the insurance sales market. Farmers exercised no market power in this highly competitive market, and plaintiffs' antitrust action fails for this reason alone. Additionally, even if we accept plaintiffs' alleged markets as the relevant markets for our inquiry, plaintiffs still fail to raise a question of material fact on the issue of whether Farmers has market power. Plaintiffs fail to offer any evidence of above-market computer prices or high switching or information costs. They present no evidence that Farmers engaged in price discrimination, and they offer no plausible economic

argument that would support market power. For all of these reasons, we find that plaintiffs have failed to raise a question of material fact as to whether Farmers violated antitrust laws. The judgment of the district court is, therefore, AFFIRMED.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-50559

D.C. Docket No. A-92-CV-373

UNITED FARMERS AGENTS ASSOCIATION, INC.; Thomas J. Vinson; Robert D. Moon,

Plaintiffs-Appellants,

v.

FARMERS INSURANCE EXCHANGE, a California Reciprocal or Inter-Insurance Exchange; Fire Insurance Exchange, a California Reciprocal or Inter-Insurance Exchange; Truck Insurance Exchange, a California Reciprocal or Inter-Insurance Exchange; Mid-Century Insurance Company; Farmers New World Life Insurance Company,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas, Austin

Before GARWOOD, DAVIS, and DeMOSS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the district court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: September 26, 1996

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 95-50559

UNITED FARMERS AGENTS ASSOCIATION, INC.,
THOMAS J. VINSON, on behalf of himself and all persons similarly situated, and
ROBERT D. MOON, on behalf of himself and all persons similarly situated,

Plaintiffs-Appellants,

v.

FARMERS INSURANCE EXCHANGE, a California reciprocal or inter-insurance exchange;
FIRE INSURANCE EXCHANGE, a California reciprocal or inter-insurance exchange;
TRUCK INSURANCE EXCHANGE, a California reciprocal or inter-insurance exchange;
MID-CENTURY INSURANCE COMPANY; and FARMERS NEW WORLD
LIFE INSURANCE COMPANY,

Defendants-Appellees

Appeal from a decision of the United States District Court for the Western District of Texas in Civil Action No. 92 CA 373 (consolidated with No. 92 CA 374) rendered on April 19, 1995 as entered on June 7, 1995 and amended on June 19, 1995 by Judge Lucius D. Bunton, III

APPELLANTS' PETITION FOR REHEARING

TABLE OF CONTENTS

POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE PANEL OF THE COURT A-17

I. The Court cannot, as a matter of law, define the relevant market for the purpose of this antitrust inquiry to be the worldwide market for insurance sales while maintaining that Farmers agents are the only consumers for the purpose of determining information and switching costs A-17

II. Since the Court defines Farmers agents to be the consumers in the relevant tying market, the relevant market must be confined to the market for electronic access to Farmers policy information A-17

III. Sufficient summary judgment evidence exists to demonstrate that computers sold by Farmers to its agents were sold at a premium over acceptable alternative A-17

IV. Sufficient summary judgment evidence exists to demonstrate the existence of price discrimination between certain classes of agents A-17

V. Since Farmers undeniably has monopolistic control over the tying product and has succeeded in overcharging its agents for tied products, and since proof exists of price discrimination, sufficient summary judgment proof exists to demonstrate market power and antitrust violation A-17

ARGUMENT A-17

I. The Court cannot, as a matter of law, define the relevant market for the purpose of this antitrust inquiry to be the worldwide market for insurance sales while maintaining that Farmers agents are the

only consumers for the purpose of determining information and switching costs A-17

II. Since the Court defines Farmers agents to be the consumers in the relevant tying market, the relevant market must be confined to the market for electronic access to Farmers policy information A-18

III. Sufficient summary judgment evidence exists to demonstrate that computers sold by Farmers to its agents were sold at a premium over acceptable alternatives A-20

IV. Sufficient summary judgment evidence exists to demonstrate the existence of price discrimination between certain classes of agents A-22

V. Since Farmers undeniably has monopolistic control over the tying product and has succeeded in overcharging its agents for tied products, and since proof exists of price discrimination, sufficient summary judgment proof exists to demonstrate market power and antitrust violation A-23

REQUEST FOR ANSWER A-24

TABLE OF AUTHORITIES

Cases

Eastman Kodak Co. v. Image Technical Services, Inc.,
504 U.S. 451, 112 S.Ct. 2072 (1992) A-18, 19, 21, 22, 23

POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE PANEL OF THE COURT

I. The Court cannot, as a matter of law, define the relevant market for the purpose of this antitrust inquiry to be the worldwide market for insurance sales while maintaining that Farmers agents are the only consumers for the purpose of determining information and switching costs.

II. Since the Court defines Farmers agents to be the consumers in the relevant tying market, the relevant market must be confined to the market for electronic access to Farmers policy information.

III. Sufficient summary judgment evidence exists to demonstrate that computers sold by Farmers to its agents were sold at a premium over acceptable alternatives.

IV. Sufficient summary judgment evidence exists to demonstrate the existence of price discrimination between certain classes of agents.

V. Since Farmers undeniably has monopolistic control over the tying product and has succeeded in overcharging its agents for tied products, and since proof exists of price discrimination, sufficient summary judgment proof exists to demonstrate market power and antitrust violation.

ARGUMENT

I. The Court cannot, as a matter of law, define the relevant market for the purpose of this antitrust inquiry to be the worldwide market for insurance sales while maintaining that Farmers agents are the only consumers for the purpose of determining information and switching costs.

We would respectfully submit that the Fifth Circuit's Opinion, as rendered on July 25, 1996, contains an inconsistency— the Opinion broadly defines the relevant market to encompass the market for insurance sales in its entirety[1] while, at the same time, it limits its consumer analysis to the population of Farmers agents. If the issues of this case were relevant to the worldwide insurance sales market, the consumers being faced with such issues as cross-elasticity of demand, information cost, switching cost, and life-cycle cost would be those seeking to purchase insurance worldwide.

A relevant product market must include products, buyers, and sellers. [See Affidavit of Jonathan L. Walker, R2829 AE 114 at 13]. This case concerns only the decisions of Farmers agents (buyers) regarding the purchase of computer systems, peripherals, and service (tied products) sold by Farmers (sellers) as a prerequisite to the agents' obtaining electronic access (tying product) to necessary rating and policy information available only through Farmers' mainframe. Once the buyers, sellers and products have been defined, the relevant market cannot be so globally redefined as to include irrelevant products and consumers who have no involvement with the transactions at issue.

The Court should be reminded that this is a Summary Judgment case and evidence is limited to summary judgment proof such as affidavits which must be presumed to be correct. In his affidavit, Plaintiffs' expert defined the relevant tying market to be electronic access to Farmers' mainframe and supported that definition with a litany of facts sufficient to survive summary judgment scrutiny. His affidavit has not been legally controverted. His conclusions are further supported by the relevant market definition in Judge Nowlin's Order and the consumer analysis in this Court's Opinion.

II. Since the Court defines Farmers agents to be the consumers in the relevant tying market, the relevant market must be confined to the market for electronic

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[1] The Court's Opinion does not even limit that market to domestic insurance sales.

access to Farmers policy information.

In its analysis of the relevant market, this Court concerns itself with such matters as information costs, switching costs, and life-cycle costs. It defines information costs as "the costs incurred *by new agents* in finding out how much Farmers will charge for electronic access to policy information and other services after they begin selling Farmers policies." [O. at 4581, fn. 4 (emphasis added)]. The Court should take into consideration the evidence presented by Plaintiffs that, in order for agents to obtain the truth about Farmers' intentionally concealed computer policy, it was necessary for agents to undertake the expense and personal risk of suing Farmers in federal court. Until discovery was conducted on this case, agents were unaware that they were being falsely advised that they could access the System via third party computers. [R2826B at 8, AE 33]. Nor were they aware that there was discord between management concerning this intentional misleading of agents. [R2826B at 8, AE 34]. Since the evidence remains protected, rank and file agents to this day are not privy to this information. The Court should ask Plaintiff, Tom Vinson, what the information cost was—it cost him his career to discover Farmers' true policy—before stating that agents' information costs were "virtually nonexistent."

Of particular note is the fact that the Court does not concern itself with the information costs to the purchasers of insurance worldwide. Likewise, the Court further defines switching costs as "the costs incurred in switching from *selling* Farmers insurance to *selling* the policies of another company. [O. at 4581, fn 4 (emphasis added)]. It does not concern itself with switching costs for those buying insurance, just the agents who are selling it. The ultimate consumer in the highly competitive insurance sales market is irrelevant to this Court's analysis of these antitrust issues, and rightfully so, because the insurance buyers are not the decision makers in the real relevant market for electronic access—the agents are.

The Court's Opinion refers the reader to *Kodak* for comparison on these issues. [*Id.*] A review of the section of *Kodak* cited reveals the Supreme Court's emphasis upon buyer-related issues.

"[I]nformation is likely to be customer-specific: lifecycle costs will vary from customer to customer." *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 474 (1992). "As an initial matter, if the number of sophisticated customers is relatively small, the amount of profits to be gained by supracompetitive pricing in the [tied] market could make it profitable to let the knowledgeable consumers to take their business elsewhere." *Id.* at 475, 2086. In *Kodak* it was purchasers of Kodak parts who were being forced to buy service against their will in order to get the parts and it remained to be determined how sophisticated the buyers were when the Supreme Court sent the case back for trial; in *Farmers* it is purchasers of electronic access who were forced to buy computers, peripherals, and service against their will in order to get access and, likewise, the sophistication of the agents remains a material fact issue.

With all due respect, this Court undertook the correct analysis for the wrong relevant market and then overlooked the Plaintiffs' supporting evidence.

III. Sufficient summary judgment evidence exists to demonstrate that computers sold by Farmers to its agents were sold at a premium over acceptable alternatives.

On pages 4582 and 4583 of its Opinion, this Court states that Plaintiffs proffered no evidence that computers sold by Farmers to agents were at above-market prices or that other equipment of comparable quality was available for less. This is contrary to the sworn affidavits of Plaintiffs' experts as well as Defendants' own experts. It is also in direct conflict with the documentary evidence supporting Plaintiffs' responses to the various motions for summary judgment. Furthermore, it is in direct conflict with the evidence presented in the Statement of Facts in Appellants' Original Brief and in the argument of their Reply Brief.

Farmers has charged agents more for equipment purchased through Farmers to access the System as compared to available alternatives. [R 2826B at 15-17, AE 69-75,42,49,76-89]. Farmers charged agents for start up kits as well as monthly fees for access.

Farmers continued to charge agents $150 for start up kits even though internal memos indicate that agents were being overcharged. [R 2826B at 15, AE 69-71]. Farmers was selling agents IBM 3196 terminals for $1,224 when they knew third parties were selling them for $460.[R 2826B at 415, AE 72-74]. According to Farmers' own expert and its own internal reports, since 1983 a compatible one terminal PC was significantly less expensive than a single terminal System 36 sold by Farmers; the PC price never exceeded $8,000 to $10,000 on the open market while Farmers charged agents between $10,650 and $19,400 for IBM computers. [R 2826B at 16,17, AE 75,89]. In 1990 IBM advised Farmers of the existence of various options to the current system that would cost agents less than $5,000 each when Farmers was continuing to charge agents approximately $20,000 for its computers to perform the same functions. [R 2826B at 16, AE 42,49]. In 1991, Farmers was still charging agents as much as $22,392 for computers to access the System.[R 2826B at 16-17, AE 87,88].

Farmers' own expert concluded that Farmers agents paid an average of seven thousand five hundred dollars ($7,500.00!) more to purchase a system 36 through Farmers than they would have paid for a comparable PC or clone. "[A] stand-alone PC is significantly less expensive than a single terminal s/36." [R 2826B at 16, AE 77]. Farmers was aware that third party vendors were offering used IBM and compatible systems at substantially lower cost. One such vendor, Liberty Computer, Inc., offered to supply such used IBM computers to Farmers for sale to agents on its waiting list for less money than Farmers was charging and Farmers refused. [R 2826B at 16, AE 78-82, 87(pg.120)]. Farmers was aware at various times throughout the relevant time period that identical peripherals and terminals were available through third-party vendors at prices lower than Farmers' prices to its agents. [R 2826B at 16, AE 81,32,83,84,86]. Appellants' experts clearly set forth in their reports that alternatives existed and that they were less expensive than the Farmers' options. [R 2826B at 16, AE 85]. Farmers' computers were not "specially configured" as this Court contends. Farmers was aware than any IBM clone could access on-line if allowed to do so with no adverse impact upon the System. [R 2826B at 6, AE 15].

Farmers' own Tax Administration's Review of the Technology Leases in July, 1993, stated that agents were contractually bound to pay between $22 Million and $26 Million more than what their computers were worth. [AE 111 at 3].

All of this evidence was proffered for review by this Court as well as the District Court. The District Court somehow neglected to docket most of this evidence.[2] Now this Court has apparently overlooked it as well.

IV. Sufficient summary judgment evidence exists to demonstrate the existence of price discrimination between certain classes of agents.

Kodak defines price discrimination to include a refusal to sell the tying product to those who refused to buy the tied product. *Kodak* at 476. In *Kodak*, price discrimination was practiced "by selling parts to customers who service their own equipment, but refusing to sell parts to customers who hire third-party providers." *Id.* In the present case, Farmers allowed the owners of old machines (5280s) to continue to achieve access without requiring mandatory service agreements, while purchasers of more recent equipment were denied access unless they obtained expensive service through Farmers. [R2826 B at 12; AE 56 at 96,113]. Thus, Farmers took full advantage of agents who were seeking to buy the most recent of Farmers' computers while allowing those with machines nearing the end of their usefulness—those with lower switching costs—to achieve access at lower expense.

Since 1993, Farmers has allowed certain, more sophisticated, agents to achieve access using non-Farmers equipment while, at the same time charging less sophisticated agents outrageous prices for new and used Farmers' equipment. [R2826 B at 12-13; AE 56]. Agents who purchased 5280 systems directly through Farmers were

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[2] See Appellants' Original Brief, Statement of the Case at 5, Argument at 19, and Statement of Facts at 6 fn. 1.

allowed access while those purchasing the same systems through other agents (even though originally purchased directly through Farmers) were denied access. [R2826 B at 19; AE 99, 100]. By the same token, Farmers refused to give certain classes of insurance referrals to agents who did not buy computers through Farmers as a way of punishing those who refused to subsidize Farmers' computer system. Using the *Kodak* definition, these sorts of differential treatments qualify as price discrimination and serve to conflict with this Court's assertion that Plaintiffs offered no evidence of price discrimination.

V. Since Farmers undeniably has monopolistic control over the tying product and has succeeded in overcharging its agents for tied products, and since proof exists of price discrimination, sufficient summary judgment proof exists to demonstrate market power and antitrust violation.

Plaintiffs' market expert, a senior economist with Economists Inc. of Washington, D.C., defined the relevant market for electronic access to Farmers' policy and policyholder information. He identified Farmers as sole vendor in this market. He showed that Farmers had power in this market in that Farmers was able to set its price without being subject to the imposition of pricing by competitive process. He further showed that Farmers exercised its market power by tying the purchase of electronic access and the purchase of computers, peripherals, and service. "Agents' fully loaded cost for electronic access (the total cost of all of the necessary inputs to effect electronic access including the computer at the agent's office as well as any direct access charge) often, and perhaps always, far exceeded the fully loaded cost agents would have paid if Farmers had allowed them to access ACS via hardware purchased from third parties. The Seller can only force buyers to pay such overcharges if that seller has market power." [R 2829; AE 114 at 13-15, quoted at length in Appellants' Reply Brief at 10-11].

This Court's Opinion states:

"Without an allegation that price discrimination occurred or evidence that Farmers agents faced prohibitive costs in discovering Farmers' computer policy, the plaintiffs cannot

seriously argue that Farmers had or exploited any market power."

[O. at 4584].

Without waiving any argument that no such threshold allegations are required since *Kodak*, Plaintiffs have demonstrated both price discrimination and prohibitive information costs and have raised a question of material facts as to whether Farmers had market power in the market for electronic access to policy information.

REQUEST FOR ANSWER

Appellants respectfully request that the issues of relevant market and market power be reheard in light of a complete review of all of the summary judgment evidence presented by Plaintiffs and are confident that such a review will prove Plaintiffs are entitled to a trial on the merits. Should the Court deny Appellants' request for rehearing, Appellants further request an answer for the purpose of clarifying the above-referenced inconsistencies.

Respectfully submitted,

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DATED: August 7, 1996